

155 FERC ¶ 61,305  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

Empire State Connector Corporation

Docket No. ER16-1495-000

ORDER GRANTING APPLICATION FOR AUTHORIZATION TO CHARGE  
NEGOTIATED RATES SUBJECT TO CONDITION AND GRANTING WAIVERS

(Issued June 24, 2016)

1. On April 25, 2016, pursuant to section 205 of the Federal Power Act (FPA)<sup>1</sup> and section 35 of the Commission's regulations,<sup>2</sup> Empire State Connector Corporation (Empire) filed a request for authorization to charge negotiated rates for the sale of transmission rights and services on an approximately 260-mile High-Voltage Direct Current (HVDC) transmission project of up to 1,000 MW (Project) and for waiver of certain Commission regulations and reporting requirements. In this order, we grant Empire's request to charge negotiated rates for transmission rights and services on the Project, subject to condition, and grant the request for waivers, as discussed below.

**I. Background**

**A. Applicant**

2. Empire states that its ownership is divided evenly between oneGRID Corporation (oneGRID) and Forum Equity Partners Inc. (Forum Equity) and that it is organized under the laws of Delaware. According to the application, oneGRID is an independent transmission developer, organized under the laws of Ontario. Forum Equity is a privately owned alternative investment management and principal investment firm with a focus on infrastructure, energy and renewables, and real estate. Empire states that Forum Equity is not actively involved in the day-to-day operations of Empire.

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<sup>1</sup> 16 U.S.C. § 824d (2012).

<sup>2</sup> 18 C.F.R. pt. 35 (2016).

3. Empire states that oneGRID and Forum Equity do not own or operate any existing electric generation, transmission or distribution facilities in the markets operated by the New York Independent System Operator, Inc. (NYISO). Empire states that two private individuals with interest in oneGRID and certain funds or investments managed by Forum Equity, own or control, individually or in the aggregate with their affiliates, a 10 percent or greater interest in the Empire's voting securities.<sup>3</sup>

#### **B. Description of Empire's Project**

4. Empire proposes to build a 320 kV HVDC electric transmission line, up to 1,000 MW, located entirely within the state of New York, connecting the upstate (northwestern) region and New York City. Empire states that the Project will originate at a proposed converter substation located near the existing Marcy substation near Utica, New York or Clay substation in Clay, New York and will terminate at the converter substation located near the Mott Haven substation in Bronx, New York or at the Gowanus substation in Brooklyn, New York. Empire notes that the final route and points of interconnection are subject to an ongoing review.

5. Empire explains that the approximately 260-mile transmission line will consist of two solid-state HVDC electric cables, each approximately 6 inches in diameter, buried underground until they reach the nearby Erie Canal. The Project will then be routed primarily underwater via the existing right-of-way in the Erie Canal until reaching the Hudson River and will be placed approximately 3-9 feet under the Hudson riverbed.<sup>4</sup> Empire states that upon completion of the Project, Empire will turn over its operational control to NYISO, which will operate the line pursuant to its Open Access Transmission Tariff (Tariff).

#### **C. Empire's Proposal**

6. Empire requests (1) authority to sell transmission rights and services on the Project at negotiated rates and (2) waiver of certain Commission regulations. Empire contends that its proposal meets the four-factor analysis as outlined in *Chinook*.<sup>5</sup> Empire further contends that its proposal complies with the Commission's Policy Statement addressing the allocation of capacity for new merchant transmission projects and participant-funded

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<sup>3</sup> Empire Filing at 2-3.

<sup>4</sup> *Id.* at 3-4.

<sup>5</sup> *Id.* at 5 (citing *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134, at P 37 (2009)).

transmission projects.<sup>6</sup> In support of these contentions, Empire explains that it will conduct an open solicitation and capacity allocation process, consistent with the requirements of the Commission's Policy Statement. Empire also proposes to allocate up to 100 percent of the Project's initial capacity to one or more transmission customers through the solicitation and capacity allocation process.

7. Empire states that it has completed an engineering pre-feasibility study and market analysis to assess the commercial opportunities available to the Project's potential customers. In addition, Empire states that it has retained engineering and environmental consultants to assist in obtaining necessary permits in the State of New York. Empire states that it submitted an interconnection request to NYISO<sup>7</sup> to interconnect the Project from the Marcy or Clay substations in northwest New York to the Mott Haven or Gowanus substations in New York City and has begun land acquisition efforts. Empire states that, in accordance with the NYISO interconnection procedures, NYISO completed a feasibility study that determined that Empire's preferred interconnection points are viable and will next conduct a system reliability impact study to identify the impact of the Project on the NYISO-controlled transmission grid. Empire also explains that it has begun its public outreach efforts with New York's resource agencies, nongovernmental organizations, and interested stakeholders to facilitate the design, siting, and permitting of the Project and will continue these efforts throughout the permitting process.<sup>8</sup>

8. Empire requests that the Commission grant its application by June 24, 2016 in order to assess interest in the Project and move forward with the open solicitation process.<sup>9</sup>

## **II. Notice, Interventions, and Responsive Pleadings**

9. Notice of Empire's filings was published in the *Federal Register*, 81 Fed. Reg. 25,661 (2016), with interventions and protests due on or before May 16, 2016. None were filed.

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<sup>6</sup> *Id.* at 6 (citing *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects*, 142 FERC ¶ 61,038 (2013) (Policy Statement)).

<sup>7</sup> NYISO Interconnection Queue #506. Empire Filing at n.10.

<sup>8</sup> *Id.* at 4-5.

<sup>9</sup> *Id.* at 16.

### III. Discussion

10. As discussed below, the Commission grants Empire's request to charge negotiated rates for transmission rights and services on the Project, subject to condition,<sup>10</sup> and grants Empire's request for waivers.

#### A. Negotiated Rate Authority

11. In evaluating negotiated rate applications, the Commission has focused on four areas of concern: (1) the justness and reasonableness of rates; (2) the potential for undue discrimination; (3) the potential for undue preference, including affiliate preference; and (4) regional reliability and operational efficiency requirements.<sup>11</sup> This approach simultaneously acknowledges the financing realities faced by merchant transmission developers and mandates of the FPA and the Commission's open access requirements. Moreover, this approach allows the Commission to use a consistent framework to evaluate requests for negotiated rate authority from a wide range of merchant transmission projects that can differ substantially from one project to the next.

#### 1. Factor One: Just and Reasonable Rates

12. To approve negotiated rates for a transmission project, the Commission must find that the rates are just and reasonable.<sup>12</sup> In determining whether negotiated rates will be just and reasonable, the Commission looks to whether the merchant transmission owner has assumed the full market risk for the cost of constructing its project and is not building within the footprint of its own (or an affiliate's) traditionally regulated system. In such a case, there are no captive customers who would be required to pay the costs of the project. The Commission will also consider whether the merchant transmission owner or an affiliate already owns transmission facilities in the region where the project is to be located, what alternatives customers have, whether the merchant transmission owner is

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<sup>10</sup> The Commission can revise a proposal filed under section 205 of the FPA as long as the filing utility accepts the change. *See City of Winnfield v. FERC*, 744 F.2d 871, 875-77 (D.C. Cir. 1984). A utility is free to indicate that it is unwilling to accede to the Commission's conditions in this order by withdrawing its filing.

<sup>11</sup> *Chinook*, 126 FERC ¶ 61,134 at P 37.

<sup>12</sup> *Id.* *See also, Champlain Hudson Power Express, Inc.*, 132 FERC ¶ 61,006, at P 17 (2010).

capable of erecting any barriers to entry among competitors, and whether the merchant transmission owner would have any incentive to withhold capacity.<sup>13</sup>

**a. Empire's Proposal**

13. Empire states that it will assume all market risk for the Project and there are no captive customers. Therefore, Empire asserts that no entity would be required to purchase transmission service from Empire, nor will Empire be able to pass any of the costs associated with the Project to captive customers. Empire explains that it is a new market entrant that does not own or operate any existing facilities in NYISO, nor does it have any affiliates who own or operate any facilities in NYISO's market.

14. Empire reiterates that, after the Project is completed, it will turn over operational control of the line to NYISO, which will operate the line under NYISO's Tariff. Empire states that this will prevent it from acquiring market power or controlling barriers to entry in the NYISO market. In addition, Empire states that, under NYISO's Tariff, incumbent transmission owners have an obligation to expand their transmission capacity at cost-based rates, upon request, and therefore, no entity will purchase transmission service from Empire unless it is cost-effective to do so when compared to the incumbent transmission owners' cost of expanding capacity.<sup>14</sup>

15. Finally, Empire states that the Commission has recognized that the price differential between markets at either end of a merchant transmission line can serve as a cap on a merchant transmission developer's ability to charge (and customers' willingness to pay) for transmission service on a project. Empire asserts that, in its case, the price differential between upstate New York and New York City will provide an effective cap on rates the Project will be able to realize.<sup>15</sup>

**b. Commission Determination**

16. We conclude that, if executed as explained in Empire's filing, Empire's request for authority to charge negotiated rates for service on the Project has met the first of the *Chinook* factors. Empire is assuming all market risk associated with the Project and has no captive customers. Empire has no ability to erect barriers to entry or to exercise market power because neither Empire nor any of its affiliates own or operate any

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<sup>13</sup> *Chinook*, 126 FERC ¶ 61,134 at P 38.

<sup>14</sup> Empire Filing at 8-9.

<sup>15</sup> *Id.* at 9.

transmission facilities in NYISO's market. Additionally, Empire will turn over operational control of the line to NYISO after the Project is completed.

17. Moreover, no entity on either end of the Project is required to purchase transmission service from Empire. Pursuant to NYISO's Tariff, NYISO is obligated to expand transmission capacity upon a customer's request at cost-based rates.<sup>16</sup> Therefore, as Empire points out, customers will purchase transmission service from Empire only if it is cost effective. Accordingly, we find that Empire's Project, if executed as explained in Empire's filing, satisfies the first criterion of the Commission's four-factor analysis.

## 2. Factor Two: Undue Discrimination

18. As explained in *Chinook*, the Commission has in the past primarily looked at two factors to ensure that applicants cannot exercise undue discrimination when approving negotiated rate authority: (1) the terms and conditions of a merchant developer's open season; and (2) its Tariff commitments (or in the regional transmission operator (RTO)/independent system operator (ISO) context, its commitment to turn operational control over to the RTO or ISO).<sup>17</sup> The Policy Statement, however, provides an alternative to conducting a formal open season. Under this alternative, a developer may demonstrate no undue discrimination or preference by conducting an open solicitation that complies with the requirements of the Policy Statement.<sup>18</sup> Specifically, the developer must: (1) broadly solicit interest in the project from potential customers; and (2) after the solicitation process, demonstrate to the Commission that it has satisfied the solicitation, selection, and negotiation process criteria set forth in the Policy Statement.<sup>19</sup>

19. In the Policy Statement, the Commission stated that applicants must issue broad notice of the project in a manner that ensures that all potential and interested customers are informed of the proposed project, such as by placing notice in trade magazines or

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<sup>16</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on reh'g*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

<sup>17</sup> *Chinook*, 126 FERC ¶ 61,134 at P 40.

<sup>18</sup> Policy Statement, 142 FERC ¶ 61,038 at PP 15, 23.

<sup>19</sup> *Id.* P 16.

regional energy publications.<sup>20</sup> Such notice should include developer points of contact, pertinent project dates, and sufficient technical specifications and contract information to inform interested customers of the nature of the project, including: (1) project size/capacity; (2) end points of the line; (3) projected construction and/or in-service dates; (4) type of line; (5) precedent agreement (if developed); and (6) other capacity allocation arrangements (including how the developer will address potential oversubscription of capacity).<sup>21</sup> The developer should also specify in the notice the criteria it plans to use to select transmission customers. In addition, the developer may also adopt a specific set of objective criteria it will use to rank prospective customers, provided it can justify why such criteria are appropriate. Finally, the Policy Statement states that the Commission expects the developer to update its notice if there are any material changes to the nature of the project or the status of the capacity allocation process, in particular to ensure that interested entities are informed of any remaining available capacity.<sup>22</sup>

20. Additionally, in the Policy Statement, the Commission continued to require merchant transmission developers to disclose the results of their capacity allocation process, though this disclosure would be part of the Commission's approval of the capacity allocation process and thus noticed and acted upon under section 205 of the FPA. Developers must be able to demonstrate that the processes that led to the identification of transmission customers and the execution of the relevant contractual arrangements are consistent with the Policy Statement and the Commission's open access principles. Merchant transmission developers must describe the criteria used to select customers, any price terms, and any risk-sharing terms and conditions that served as the basis for identifying transmission customers selected versus those that were not, as well as provide certain information listed in the Policy Statement in order to provide transparency to the Commission and interested parties.<sup>23</sup> The Policy Statement emphasizes that the information in the post-selection demonstration is an essential part of a merchant developer's request for approval of a capacity allocation process, and that the developer will have the burden to demonstrate that its process was in fact not unduly discriminatory or preferential, and resulted in rates, terms, and conditions that are just and reasonable.<sup>24</sup>

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<sup>20</sup> *Id.* P 23.

<sup>21</sup> *Id.* P 20.

<sup>22</sup> *Id.* PP 24-27.

<sup>23</sup> *Id.* P 30.

<sup>24</sup> *Id.* P 32.

a. **Empire's Proposal**

21. Empire commits to conduct an open solicitation process consistent with the requirements of the Policy Statement. Empire states that it will retain a third-party independent adviser, experienced in overseeing open seasons for merchant transmission capacity, to facilitate broad notice of the Project and the selection and ranking of prospective customers. Empire states that, to initiate an open season solicitation process, Empire anticipates devoting a part of its website specifically to the open solicitation process and issuing a press release that will be circulated, at a minimum, to energy trade publications, news outlets within the NYISO region, and a list of potential transmission customers developed by Empire and its independent adviser. Empire states that both the website and press release will identify the developer points of contact, project dates, and sufficient technical specifications to inform interested customers of the nature of the Project, including the Project's capacity, the interconnection points, anticipated dates for significant development and construction milestones and in-service dates, the characteristics of the line, a statement regarding allocation of capacity, other capacity allocation arrangements, and the criteria that Empire will utilize to assess, rank and select potential customers. Empire further states that the press release will identify the website address for Empire's open solicitation process and the website will contain more detailed information about the Project. Empire states that the website information will include activities completed to date, a confidentiality agreement, additional details regarding selection and ranking criteria, a form of precedent agreement, and information about dates and locations of public meetings where Empire will address inquiries from potential customers.<sup>25</sup>

22. Empire asserts that once customer agreements have been executed, it will post on its website the winning bidder(s), quantity, the expiration date of the transmission rights awarded, and the bidders' contact information for potential resale of the transmission rights. Empire states that, at the completion of the open solicitation process, it will make a compliance filing with the Commission to disclose the results of its capacity allocation process and demonstrate that its capacity allocation was consistent with the Policy Statement and the Commission's open access policies. In the compliance filing, Empire states that it will provide, at a minimum: (1) a description of the actions Empire took to provide a broad notice, including information about the Project and the customer evaluation criteria; (2) the identity of the parties who expressed interest in the Project, placed bids and/or purchased capacity (and the capacity amounts, terms, and prices involved in that interest, bid, or purchase); (3) the basis for Empire's rationale for capacity proration, if any, if the Project is oversubscribed; (4) the basis for Empire's

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<sup>25</sup> Empire Filing at 9-11.

rationale not to increase capacity of the Project if it is oversubscribed; (5) Empire's justification for offering more affordable rates, terms, and conditions to certain customers, such as "first movers"<sup>26</sup> or those willing to take on greater project risk-sharing; (6) the criteria used by Empire for distinguishing customers and the method used for evaluating bids; and (7) Empire's rationale for selecting or rejecting customers, including any rates, terms, or conditions of agreements unique to individual customers that led to their selection. Lastly, Empire states that it will (1) ensure that books and records for the Project will comply with the Uniform System of Accounts (USofA) in Part 101 of the Commission's regulations<sup>27</sup> and will be subject to examination pursuant to Part 41 of the CFR;<sup>28</sup> (2) file financial statements and reports in accordance with Part 141.14 and 141.15 of the Commission's regulations;<sup>29</sup> and, (3) employ an independent auditor to audit its books and records.<sup>30</sup>

**b. Commission Determination**

23. The Commission acknowledges Empire's commitment to conduct an open solicitation and capacity allocation process consistent with the requirements of the Policy Statement and will reserve judgment on whether that open solicitation and capacity allocation process was not unduly discriminatory pending Empire making a compliance filing with the Commission within 30 days of the close of the open solicitation process disclosing the results of its capacity allocation process and demonstrating that its capacity allocation was consistent with the Policy Statement and the Commission's open access policies.<sup>31</sup> Empire commits to allocate up to 100 percent of the Project's initial capacity through a transparent, open solicitation process consistent with the requirements of the

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<sup>26</sup> "First movers" refers to those customers who respond early and take on greater project risk. *See Allocation of Capacity on New Merch. Transmission Projects & New Cost-Based, Participant-Funded Transmission Projects Priority Rights to New Participant-Funded Transmission*, 140 FERC ¶ 61,061, at P 16 (2012).

<sup>27</sup> Empire Filing at 12 (citing 18 C.F.R. pt. 101).

<sup>28</sup> *Id.* (citing 18 C.F.R. pt. 41).

<sup>29</sup> *Id.* (citing 18 C.F.R. pt. 141).

<sup>30</sup> *Id.* at 11-12.

<sup>31</sup> The Policy Statement indicates how the Commission will treat that compliance filing. Policy Statement, 142 FERC ¶ 61,038 at P 31.

Policy Statement. Empire also commits to retain a third-party independent adviser, experienced in overseeing open seasons for merchant transmission capacity, to facilitate broad notice of the Project and the selection and ranking of prospective customers. Empire also commits to turn over operational control of the Project to NYISO.

24. We also acknowledge Empire's commitment that, consistent with *Chinook*, once the Project has commenced operation, Empire will (1) ensure that the books and records for the Project will comply with the USofA found in Part 101 of the Commission's regulations<sup>32</sup> and will be subject to examination as required in Part 41 of the CFR,<sup>33</sup> (2) file financial statements and reports in accordance with Parts 141.14 and 141.15 of the Commission's regulations;<sup>34</sup> and (3) employ an independent auditor to audit its books and records.<sup>35</sup> These commitments will assist the Commission in carrying out its oversight role.

### 3. Factor Three: Undue Preference and Affiliate Concerns

25. In the context of merchant transmission, the Commission's concerns regarding the potential for affiliate abuse arise when the merchant transmission owner is affiliated with either the anchor customer, participants in the open season or solicitation, or customers that subsequently take service on the merchant transmission line. In the Policy Statement, the Commission stated that it would allow merchant transmission developers to award up to 100 percent of a project's capacity to a single customer, including an affiliate, but that it would expect an affirmative showing that the affiliate is not afforded an undue preference. The Commission noted that the developer will bear a high burden to demonstrate that the assignment of capacity to its affiliate and the corresponding treatment of nonaffiliated potential customers is just, reasonable, and not unduly preferential or discriminatory.<sup>36</sup>

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<sup>32</sup> Empire Filing at 12 (citing 18 C.F.R. pt. 101).

<sup>33</sup> *Id.* (citing 18 C.F.R. pt. 41).

<sup>34</sup> *Id.* (citing 18 C.F.R. pt. 141).

<sup>35</sup> *Id.* at 11-12.

<sup>36</sup> Policy Statement, 142 FERC ¶ 61,038 at PP 18-19.

**a. Empire's Proposal**

26. Empire asserts that its proposal to charge negotiated rates for transmission service rights does not raise any undue preference or affiliate concerns. Empire states that none of Empire's affiliates own or operate electric facilities in NYISO and the Project will not interconnect with any existing facilities owned by an affiliate of Empire. Empire further states that, at the time of its filing, it does not anticipate that any transmission customer initially allocated transmission rights through the open solicitation process will be affiliated with Empire. If an affiliate purchases transmission rights through the open solicitation process, Empire commits to document the facts and circumstances surrounding this allocation of capacity in its subsequent compliance filing. To the extent that an affiliate takes transmission service on the Project, Empire states that it will maintain separate books and records that will be made available to the Commission in accordance with the Commission's regulations. Empire pledges also to comply with the Commission's Standards of Conduct<sup>37</sup> and all other affiliate rules and filing requirements. Additionally, Empire commits to turn over operational control of its facilities to NYISO and file electric quarterly reports (EQRs) of its transactions as required of transmission providers.

**b. Commission Determination**

27. The Commission acknowledges Empire's commitment to engage in an open solicitation process and make a compliance filing with the Commission disclosing the results of the capacity allocation process and describing the process in sufficient detail to demonstrate no affiliate has been afforded undue preference. We note that Empire states that none of its affiliates owns or operates electric facilities in NYISO and the Project will not interconnect with any existing facilities owned by an affiliate of Empire. In addition, we acknowledge Empire's commitment to turn over operational control of its facilities to NYISO, file EQRs of its transactions, comply with all other affiliate rules and abide by the Commission's Standards of Conduct to the extent any affiliate takes transmission service on the Project. The commitments made by Empire regarding the open solicitation process and reporting requirements will ensure that all transactions are transparent. We accept these commitments as addressing our affiliate preference concerns, subject to our approval of Empire's compliance filing demonstrating that the assignment of capacity to any affiliate and the corresponding treatment of nonaffiliated potential customers are just, reasonable, and not unduly discriminatory or preferential.

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<sup>37</sup> 18 C.F.R. pt. 358 (2016).

#### 4. **Factor Four: Regional Reliability and Operational Efficiency**

28. In order to ensure regional reliability and operational efficiency, the Commission expects that any merchant transmission projects connected to an RTO or ISO turn over operational control to the RTO/ISO. Further, merchant transmission projects, like cost-based transmission projects, are subject to mandatory reliability requirements. Merchant transmission developers are required to comport with all applicable requirements of the North American Electric Reliability Corporation (NERC) and any regional reliability council in which they are located.

##### a. **Empire's Proposal**

29. As noted above, Empire commits to turn over operational control of the Project to NYISO and will comply with all applicable NERC and the Northeast Power Coordinating Council (NPCC) reliability requirements. Furthermore, Empire states that it will provide to NYISO all required information necessary to inform its regional planning process, as required by Order No. 1000.<sup>38</sup>

##### b. **Commission Determination**

30. We acknowledge Empire's commitment to turn over operational control of the Project to NYISO, comply with all applicable NERC and NPCC reliability requirements, and provide NYISO with all required information necessary for its regional transmission process pursuant to Order No. 1000. Accordingly, we find that, if executed as explained in Empire's filing, Empire's proposal meets the regional reliability and operational efficiency requirements, subject to Empire's continuing participation in NYISO's regional transmission planning processes.<sup>39</sup>

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<sup>38</sup> Empire Filing at 13-14 (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014)).

<sup>39</sup> Order No. 1000 requires merchant transmission developers to provide "adequate information and data to allow public utility transmission providers in the transmission planning region to assess the potential reliability and operational impacts of the merchant transmission developer's proposed transmission facilities on other systems in the region." Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 164; *see also N.Y. Indep.Sys. Operator, Inc.*, 143 FERC ¶ 61,059, at P 82 (2013).

## **B. Waiver Request**

### **1. Empire's Request**

31. Empire requests that the Commission grant waiver of certain filing and reporting regulatory requirements that will become effective when Empire becomes a public utility.<sup>40</sup> Empire states that the Commission has granted similar waiver requests to other merchant transmission owners seeking negotiated rate authority.<sup>41</sup> Specifically, Empire requests waiver of: (1) the full reporting requirements of Subparts B and C of Part 35 of the Commission's regulations (except for sections 35.12(a), 35.13(b), 35.15, and 35.16); (2) the Form No. 1, Annual Report of Major Electric Utilities, Licenses and Others (Form 1) filing requirement; and (3) Part 141, with the exception of sections 141.14 and 141.15.<sup>42</sup> Empire also requests waiver of any other part of the Commission's regulations as necessary to the grant the authorizations requested herein.

### **2. Commission Determination**

32. We find that the regulations requiring the filing of cost-based data are not applicable here because Empire is proposing to charge negotiated rates. Accordingly, for good cause shown and consistent with our findings for other merchant transmission proposals, we will grant waiver of the full reporting requirements of Subparts B and C of Part 35 of the Commission's regulations, except for the requirements of sections 35.12(a), 35.13(b), 35.15, and 35.16, as requested by Empire.<sup>43</sup>

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<sup>40</sup> Empire explains that, because it is not currently filing with this application a proposed tariff or rate schedule and does not yet provide transmission service, Commission action on the present filing will not, *per se*, make Empire a public utility under *Multitrade*. Empire Filing at 16 (citing *Multitrade Limited Partnership*, 63 FERC ¶ 161,252, at 62,692 (1993)).

<sup>41</sup> *Id.* at 17 (citing *Southline Transmission, L.L.C.*, 152 FERC ¶ 61,211, at P 77 (2015); *Chinook*, 126 FERC ¶ 61,134 at PP 68-69; *Rock Island Clean Line LLC*, 139 FERC ¶ 61,142, at PP 43-47 (2012); *Neptune Regional Transmission System, LLC*, 139 FERC ¶ 61,110, at P 12 (2012)).

<sup>42</sup> *Id.* at 16-17.

<sup>43</sup> *See, e.g., Tres Amigas, LLC*, 153 FERC ¶ 61,287, at P 48 (2015), *Lucky Corridor, LLC*, 151 FERC ¶ 61,072, at P 47 (2015).

33. We will also grant Empire's request for waiver of Part 141 (except sections 141.14 and 141.15) and Form No. 1 relating to forms and reports, except sections 141.14 and 141.15. The Commission has previously granted waiver of the Form No. 1 filing requirements to other merchant transmission owners.<sup>44</sup>

The Commission orders:

(A) Empire is hereby granted authority to sell transmission rights and services on its proposed merchant transmission project at negotiated rates, subject to condition, as discussed in the body of this order.

(B) Empire is hereby directed to file with the Commission a compliance filing within 30 days after the close of Empire's open solicitation process, as discussed in the body of this order.

(C) As discussed in the body of this order, Empire is hereby granted waiver of (1) the provisions of Subparts B and C of Part 35 of the Commission's regulations, except for the requirements of sections 35.12(a), 35.13(b), 35.15, and 35.16; (2) the Form No. 1, Annual Report of Major Electric Utilities, Licenses and Others filing requirement; and (3) Part 141, with the exception of sections 141.14 and 141.15.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>44</sup> See, e.g., *Plains & E. Clean Line LLC, et al.*, 148 FERC ¶ 61,122, at P 35 (2014); *Lucky Corridor, LLC*, 151 FERC ¶ 61,072 (2015).